



## State of New Hampshire

### PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 2301,  
Seabrook Supervisory Employees

Complainant

v.

Town of Seabrook

Respondent

Case No. M-0592-17

Decision No. 2001-092

### APPEARANCES

#### Representing AFSCME Council 93, Seabrook Supervisory Employees:

Angela Wessels, Esq.

#### Representing Town of Seabrook:

Robert D. Ciandella, Esq.

#### Also appearing:

Russ Bailey, Town Manager  
Jack McMath, AFSCME, NH Coordinator  
Deidre Greene, AFSCME, Local 2301  
John Starkey, AFSCME, Local 2301  
David Currier, AFSCME, Local 2301  
Jeffrey Baillargeom, AFSCME, Local 2301

### BACKGROUND

AFSCME, Council 93, Local 2301 (Union), on behalf of Seabrook Supervisory Employees, filed unfair labor practice (ULP) charges on June 27, 2001 alleging violations of RSA 273-A:5 I (e) resulting from a refusal to negotiate compensation for four (4) bargaining unit positions after a demand to do so and after the signing of a successor agreement. The Town of Seabrook (Town) filed its answer on July 12, 2001. The parties then attended a pre-hearing conference on July 23, 2001 which set a hearing date of August 23, 2001, a date which was subsequently postponed at the mutual convenience of counsel for the parties. This matter was

then rescheduled for hearing before the PELRB on September 18, 2001. In the meantime, the Town filed a motion to dismiss and a counterclaim on August 21, 2001. The Union filed an answer to and a motion to dismiss that counterclaim on September 17, 2001. This matter then proceeded to hearing before the PELRB on September 18, 2001 at which the parties were represented by counsel. At the conclusion of that hearing, the parties requested, and were given to October 2, 2001 to file post-hearing briefs. Those briefs were filed on October 2, 2001.

### FINDINGS OF FACT

1. The Town of Seabrook operates a town government, employs personnel to enable it to do so, and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. AFSCME, Council #93, Local 2301 is the duly certified bargaining agent for a bargaining unit of supervisory employees employed by the Town.
3. The Town and the Union are parties to a collective bargaining agreement (CBA), signed on April 18, 2001 and due to expire on March 31, 2002. Prior to the effective date of the current CBA, the parties operated under *status quo* provision of a previous contract which expired in 1998. The current CBA, which expires on March 30, 2002, contains a "zipper clause" at Article XX which reads:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Town and the Association, for the duration of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or or matter not specifically referred to, or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement. This Agreement may only be amended during its term by the parties' mutual agreement in writing.

This Agreement supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and together with any letters of understanding executed concurrently (or after) with the Agreement constitutes the complete and entire Agreement between the parties, and concludes collective bargaining (except as provided for in the grievance procedure) for its term.

4. The final two pages of the CBA set to expire on March 31, 2002, consist of wage schedules for the job titles in the bargaining unit, one page for 2000 and another for 2001. According to Union representative McMath, four (4) positions were added to these two wage schedules from what existed in the 1998 agreement, namely, animal control officer, assessor, deputy tax collector and wastewater treatment operator.<sup>1</sup> The placement of these four positions into the salary scale matrix resulted in pay increases to the incumbents in those positions, compared to their "pre-matrix" compensation.
5. The pertinent chronology of negotiations since the expiration of the 1998 agreement includes on-going negotiations during calendar year 2000. After rejections of earlier negotiated packages by the legislative body, the voters approved the funds for the current (a/k/a "2002") contract at a special meeting held on December 12, 2000, according to Town Manager Bailey. Once this was done, the wage schedules appended to the CBA were made effective for all members of the bargaining unit as of April 1, 2000, per the agreement of the parties and according to the testimony of both Town Manager Bailey and Local Union President Currier.
6. According to McMath's testimony, utilization of April 1, 2000 for the effective date of the 2000 pay scale appended to the CBA was prejudicial to the incumbent employees in the four positions noted in Finding No. 4. This prejudice, so-called, occurred because these four employees were not placed on the appended pay scales until approximately November of 2000. Thus, their effective and actual pay rates as of April 1, 2000 were less than the rates reflected on the 2000 salary schedule. Town Manager Bailey's testimony confirmed that the salary ranges for the four positions in question were not resolved and incorporated into the wage schedules until the Fall of 2000, but before the special meeting of December 12, 2000.
7. Bailey testified that all unit employees received benefits, also referred to as "COLA's" in his testimony, under the 2000 wage schedule appended to the year 2002 CBA with an effective date of April 1, 2000; therefore, the four employees in question were paid as of their rates at time, not their wage rates reflected on the year 2000 wage schedule which, as far as they were concerned, did not exist in April of 2000.

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<sup>1</sup> Notwithstanding this enumeration, it should be noted that the most recent bargaining unit on file with PELRB as of November 18, 1999 (Case No. M-0592-9) contains: Assistant Recreation Dept. Director, Civil Defense Director, Deputy Town Clerk, Lieutenant Detective, Water Department Superintendent, Mosquito Control Supervisor, Operations Lieutenant, Recreation Director, Welfare Officer, Deputy Town Treasurer, Code Enforcement Officer, Deputy Fire Chief, Deputy Police Chief, Chief Operator-Wastewater Treatment Plant and Part-time Assistant Code Enforcement Officer

8. Once the Union was aware of the manner in which the four employees were not compensated vis-à-vis their "COLA" stipends, McMath approached Bailey about correcting the matter, i.e., adjusting their COLA's upward to reflect their respective steps on the year 2000 pay schedule back to April of that same year.
9. It is undisputed that Bailey asked McMath to delay pursuing additional funding for the four positions in question "until next year...when we have some money." McMath said he felt he had a "verbal agreement" with Bailey about these "upgrades" which would be "subject to approval by the board of selectmen" (BOS). McMath also stated he discussed upgrades with Bailey several times at his office and in the hallway.
10. Once 2001 arrived, McMath reviewed his efforts to seek the adjustments or "upgrades." This started with his letters to Bailey on January 4, 2001 (Joint Exhibit No. 2), on April 10, 2001 (Joint Exhibit No. 3) and May 10, 2001 (Joint Exhibit No. 4). Between the dates of Joint Exhibit Nos. 3 and 4 two events occurred. The 2002 CBA was signed on April 18, 2001 and the parties met on the issue of the upgrades sought by McMath on April 19, 2001. (See Joint Exhibit No. 4.)
11. On or about May 23, 2001, Bailey met with the BOS and presented McMath's proposals relating to the four "upgrades." This was consistent with what Bailey described as his "agreement" with McMath that he "would take it [the 'upgrade' proposal] to the board [of selectmen]." The selectmen rejected the upgrade proposal at their May 23, 2001 meeting. See Joint Exhibit No. 5. Thereafter, Bailey informed Currier or McMath of that rejection. Bailey testified, "It was always understood ...it had to go to the board [of selectmen] for approval."

#### DECISION AND ORDER

The Union has alleged that the Town failed to bargain, as required by RSA 273-A:3, and, by so doing, committed an unfair labor practice as defined by RSA 273-A:5 I (e). The burden is on the Union, as complainant, to prove this claim under PUB 201.06 (c). It was unable to do so.

The record shows that the Union sought to negotiate wage adjustments for four positions (Finding No. 4) in 2001. Prior to these efforts, the parties, after various rejections of funding packages by the legislative body, came to an agreement on the wage formula for all members of the bargaining unit. This formula or "cost item" was approved by the voters in a special meeting held on December 12, 2000. (Finding No. 5.)

It was not until January of 2001 that McMath began writing a series of letters to the Town Manager seeking to bargain a different effective date for certain stipends, also referred to as "COLA's," for the four positions in question. (Finding No. 10) McMath wrote at least two of these requests to bargain to the Town Manager before April 18, 2001 when the parties signed the

CBA which has an ending date of March 31, 2002. (Finding No. 3.) Thereafter, the parties met on the upgrade issue on April 19, 2001 (Finding No. 10) and, apparently, came to an agreement on something to be considered by the Board of Selectmen (Joint Exhibit No. 4). The selectmen considered that proposal, or at least the cost consequences associated with it, and rejected it on May 23, 2001. (Finding No. 11.) The chronology and the facts fail to establish a refusal to bargain by the Town for the following reasons.

First, the Town is protected by a very broad "zipper clause" contained in Article XX of the contract. (Finding No. 3.) Besides limiting the scope of the CBA itself, the zipper clause is also forward-looking, namely, "each [party] voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this agreement, or with respect to any subject or matter not specifically referred to, or covered in this Agreement....This Agreement constitutes the complete and entire Agreement between the parties, and concludes collective bargaining...for its term."

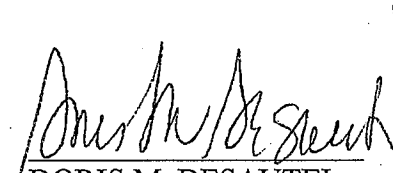
Second, if the Union's attempt to bargain was not covered by this broad zipper clause, it was essentially waived by the Union's failure or inadvertence in not securing a written exception to the language of the zipper clause to preserve its right to pursue post-ratification, post-signing negotiations on issues relating to compensation of the four positions in question. The zipper clause does provide that the contract "may only be amended during its term by the parties' mutual agreement in writing." No such agreement or reservation of right exists here.

Third, even if what we have stated in the prior two paragraphs were flawed, the record is clear that the Town, through its manager, consistently made it known to the Union that any post-ratification, post-signing negotiations relating to the four positions in question would be subject to approval by the Board of Selectmen. (Finding Nos. 9 and 11.) Not only was that approval not forthcoming from the selectmen, they specifically rejected the package they considered on May 23, 2001. There was nothing to compel them to accept it because "the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession," that is, if the obligation to bargain statutorily existed in the first place. RSA 273-A:3 I.

Accordingly, the ULP is DISMISSED.

So ordered.

Signed this 23rd day of October, 2001.

  
DORIS M. DESAUTEL  
Alternate Chairman

By unanimous decision. Alternate Chairman Doris M. Desautel presiding. Members Richard Roulx and E. Vincent Hall present and voting.